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The Powers of the President as Commander-in-Chief

In Relation to the Protection of Nationals Abroad

THE debate in the United States Senate during April, 1928 over the use of United States marines in Nicaragua to guarantee a fair election was a spontaneous outburst caused by a rider to the naval appropriation bill calling for withdrawal of the United States forces after the election. The defeat of the amendment cannot be considered as a vote on the constitutionality of our activities in Nicaragua. Opposition to the amendment was based chiefly on the ground that the United States should honor the engagements made by the President, whether or not he had the constitutional authority to make them. There was also opposition because it was felt that a question of such importance should be discussed on its merits, and not merely in considering a rider to an appropriation bill. The controversy is not yet settled and a full discussion of the powers of the President as Commander-in-Chief is likely to arise during the next session of Congress.

The Senate debate, involving as it did the larger question of the power of the President to use armed forces abroad without a declaration of war, was but a revival of discussions which have broken out periodically since the drafting of the Constitution. One may compare the controversy between Thomas Jefferson and Alexander Hamilton in 1801 over the use of force against the Barbary States; the discussion over the bombardment of Greytown, Nicaragua, by the U. S. S. *Cyane* in 1853; and the request of President Buchanan for authority to employ armed forces in Central America in 1859. The dispatch of an expedition to China during the Boxer uprising in 1900 likewise raised the issue. Frequent discussions have taken place in Congress since 1900 over the employment of marines in Haiti, Santo Domingo, and Nicaragua. The sending of United States troops against Russia in 1918 in the absence of a declaration of war has come in for its share of criticism.

The Constitution states (Article I, Section 8):

> "The Congress shall have Power . . . to declare War . . . and make Rules concerning Captures on Land and Water;

"To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

"To Provide and Maintain a Navy;

"To make Rules for the Government and Regulation of the land and naval Forces."[1]

CONSTITUTIONAL POWERS OF THE PRESIDENT

On the other hand the Constitution reads (Article II, Section 1): "The Executive Power shall be vested in a President of the United States of America;" and (Article II, Section 2): "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;" and (Article II, Section 3) "he shall take Care that the Laws be faithfully executed. . . "

Thus the President's power to use the armed forces of the United States in the absence of a declaration of war comes principally from his express constitutional power as Commander-in-Chief. This power exists in time of peace as well as during war.[1a]

The power of the President to use the armed forces of the United States for protection of the life and property of American citizens abroad results from another express power in connection with his authority as Commander-in-Chief. It was held in the Slaughter House Cases[2] that one of the privileges and immunities guaranteed by the Constitution to citizens of the United States is the right to protection abroad. Because of his duty to see that the laws are faithfully executed (Article II, Sec. 3), the President is believed to be constitutionally obligated to protect citizens abroad. And in providing such protection it is believed that he may utilize his powers as Commander-in-Chief.[3]

This was the opinion of Justice Nelson in a lower Federal Court in the case of *Durand* v. *Hollins*[4], which read in part:

"It is to him [the President] . . . the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole Executive power of the country is placed in his hands under the Constitution, and the laws passed in pursuance thereof; and different Departments of Government have been organized, through which this power may be most conveniently executed, whether by negotiation or by force—a Department of State and a Department of the Navy.

* * * *

"Under our system of Government, the citizen abroad is as much entitled to protection as the citizen at home."

With but one exception,[5] from the time of Thomas Jefferson down to the present, the Executive has consistently declared that it possessed the right to use abroad the armed forces of the United States to protect the life and property of American citizens.[6] Similarly, the Executive has always claimed the right to be the judge of the proper constitutional occasion for the employment of troops. In actual fact the powers exercised by the President today have developed through executive precedent, practice, and declaration.

OTHER SOURCES OF THE PRESIDENT'S POWER

In addition to his authority derived directly from the Constitution the President may acquire authority to employ the armed forces abroad (1) in pursuance of a treaty obligation or (2) in pursuance of congressional authorization.

(1) *Treaty Obligation.* Presidents have often decided "when the circumstances contemplated by treaties or agreements of guarantee and protection, such as those with Colombia (1846), Mexico (1882-1894), Cuba (1903) and Hayti (1916), exist, and on their own responsibility have moved troops or war vessels."[7]

(2) *Congressional Authorization.* On various occasions Congress has granted the President authority to use the armed forces

1. This power of Congress includes the right to determine such things as the rules of martial law, the relations between officers and men, the nature of equipment, etc.; it must not, however, interfere with the command of the forces. Cf. *Ex parte,* Milligan, 4 Wall. 2,139, concurring opinion of Chase, *et al.*

1a. Willoughby, W. W. *The Constitutional Law of the United States,* Vol. I, p. 472.

2. 16 Wallace 36. (*U. S. Supreme Court Reports.*)

3. Wright, Q., *The Control of American Foreign Relations,* p. 306. Corwin, E. S., *The President's Control of Foreign Relations,* p. 142 ff.

4. Blatchford, *Prize Cases,* Vol. IV, p. 451, 454.

5. President Buchanan said that without the authority of Congress the President could not lawfully use the armed forces abroad even for protecting the life or property of American citizens. In a special message to Congress, February 18, 1859, he earnestly recommended "to Congress, on whom the responsibility exclusively rests, to pass a law before their adjournment conferring on the President the power to protect the lives and property of American citizens" in countries where the local authorities do not possess the physical power, even if they possess the will, to protect our citizens. Congress did not comply. Cf. Corwin, *cited,* p. 148-9.

6. Clark, J. R. *Memorandum on Right to Protect Citizens in Foreign Countries by Landing Forces.* Rev. ed. 1912, p. 36. (U. S. State Dept.)

7. Wright, *cited,* p. 217. Cf. also Willoughby, *cited,* Vol. I, p. 472 ff.

of the United States outside the jurisdiction thereof in cases other than war.[8] However, the President has always held that these laws "except as applied to the militia were unnecessary and that as commander-in-chief and as chief executive, he has independent power to employ the army and navy and direct the civil administration in order to execute the laws and treaties of the United States."[9]

THREE FORMS OF CONTROL OF THE EXECUTIVE

The Constitution did not attempt the impossible in seeking to define the exact extent of the President's powers as Commander-in-Chief and the question has several times arisen as to whether in particular cases the President has not exceeded his power and infringed upon the constitutional power of Congress to declare war.

The question of the constitutional extent of the President's powers as Commander-in-Chief may be approached more satisfactorily from the point of view of control. What control is there over the power of the President as Commander-in-Chief? Three possible forms suggest themselves: (1) Control by the judiciary, (2) control by Congress and (3) the limits which international law may impose upon the action of the agents of one state towards another. The first two are questions of United States constitutional law and will be considered in this report.

1. *Control by the Judiciary.* The first of these three possible forms of control is easily disposed of. The courts have uniformly refused to pass upon the legality of decisions taken by the President in his political capacity. Professor W. W. Willoughby writes that "determinations by the political departments as to existence of a status of independence or of war, or of belligerency, are not reviewable by the courts."[10]

Decisions in the diplomatic field have been regarded as "political" questions by the courts. In the case of Williams v. The Suffolk Insurance Company the United States Supreme Court said:

> "Can there be any doubt that when the executive branch of the government, which is charged with the foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know that, in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and the government of the Union.
>
> "If this were not the rule cases might often arise in which, on most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character."[11]

This concept of the "political" question, says Professor Corwin, explains the lack of definite legal criteria for determining the scope of the President's powers in the field of foreign relations. "Such criteria lack," he writes, "because the courts have never had occasion to develop them, and they have never had occasion to develop them because of this concept."[12]

CONGRESSIONAL CONTROL OF THE PRESIDENT

2. *Control by Congress.* In regard to the particular powers of Congress which might be exercised to control the President's power to use troops abroad, it should be noted that Congress has the right (a) to declare war; (b) to pass resolutions directing the President to perform or to refrain from performing certain acts; and (c) to make appropriations or not, as it sees fit, for the armed forces of the United States.

8. For example, the act approved February 6, 1802, looking to the protection of American commerce, and the act of July 27, 1868, authorizing the President "to use such means, not amounting to acts of war, as he may think necessary and proper to obtain and effectuate" the release of American citizens imprisoned in foreign states. A list of such acts and authorizations is given in the Clark *Memorandum*, p. 32-8. Cf. also Willoughby, *cited*, Vol. I, 426 ff.

9. Wright, *cited*, p. 192. Similarly Mr. J. Reuben Clark summarizes the conclusion reached by the United States Supreme Court in the Neagle case (*In re* Neagle, 135 U. S. 1) by the statement "that the President was not always dependent for the exercise of his constitutional powers upon the provisions of ancillary legislation." Clark, J. R., *Memorandum*, p. 42.

10. Willoughby, W. W., *cited*, Vol. II, p. 1005.

11. 13 Peters, 415, 420. (*U. S. Supreme Court Reports.*)

12. Corwin, E. S., *cited*, p. 167.

POWERS OF THE PRESIDENT SHORT OF DECLARING WAR

(a) Since the Constitution gives the power to declare war exclusively to Congress it has been asked whether the President is under constitutional obligation not to incur the risk of war in the prosecution of his diplomatic policies.[13] To this Professor Corwin replies that we must trust in the President, but he also cites Pomeroy's Constitutional Law which states:

> "The President cannot declare war; Congress alone possesses this attribute. But the President may, without any possibility of hindrance from the legislature, so conduct the foreign intercourse, the diplomatic negotiations with other governments, as to force a war, as to compel another nation to take the initiative; and that step once taken, the challenge cannot be refused."

The landing of American armed forces to protect United States citizens in foreign countries is not normally an act of war, though it may lead to war.[14] But the President's powers extend even beyond this, says Wright:

> "As Commander-in-Chief, he may employ the armed forces in defense of American citizens abroad, as he did in the bombardment of Greytown, the Koszta case and the Boxer rebellion, and thereby commit *acts* of war, which the government they offend may consider the initiation of a state of war."[15]

In view of the wide protective powers falling short of war habitually exercised by the President as Commander-in-Chief, it is doubtful whether Congress has the power directly to control such use. It is not believed, says a Memorandum prepared for the United States Department of State:

> "that Congress may, because it is authorized to declare war against a foreign country, be considered as possessing the power to direct the President in the employment of forces in operations not amounting to war against a foreign country."[16]

The conflict between the power of Congress to declare war and the power of the President as Commander-in-Chief to authorize acts which may make war inevitable, or even to authorize the performance of *acts* of war, has been characterized as a distinction "between the existence of a constitutional power and the existence of an ability to effect certain results." The fact that the President authorizes the performance of an act which may be considered a *casus belli* "does not imply in the Executive a concurrent power to declare war."[17] There thus seems to exist a certain "overlapping" of the powers of Congress and of the President. Nevertheless, Congress is not without a certain check on the President's power. Professor Corwin concludes that the President's power of protection is somewhat analogous to the so-called right of self-preservation in international law. Theoretically, he says, "the power is a defensive power and reserved for grave and sudden emergencies. Practically the limit to it is to be found in the powers of Congress and public opinion."[18]

INDIRECT CHECKS EXERCISED BY CONGRESS

(b) On occasion, when it has appeared that the President was encroaching upon its constitutional right to declare war, Congress has considered restraining the employment of American troops in foreign lands, and joint resolutions have been passed from time to time setting forth the foreign policy considered desirable by Congress.[19] Although they are sometimes couched in mandatory language, such resolutions are not constitutionally binding on the President, and Presidents have not failed to ignore them when they disagreed with the principles advocated. Resolutions expressing general policies or principles on most subjects connected with foreign relations may constitutionally be passed by Congress and may furnish useful guides to the President as an indication of public opinion. But congressional expressions of opinion on particular issues, and attempts to direct the President, says Professor Wright, encroach upon the Executive field and may embarrass the President's action. The fact that Congress

13. Corwin, E. S., *cited*, p. 127 ff

14. Borchard, E. M. *The Diplomatic Protection of Citizens Abroad*, p. 452.

15. Wright, *cited*, p. 285.

16. Clark, J. R. *Memorandum*, p. 36.

17. U. S. 54 Cong. 2nd Sess. *Senate Doc.* No. 56, p. 4, quoted by Wright, *cited*, p. 266.

18. Corwin, *cited*, p. 156.

19. In 1894, resolutions were introduced in both houses of Congress warning the President against the use of United States naval forces in Hawaii. Cf. U. S. *Congressional Record*, 53rd Cong. 2nd Sess., p. 1814, 5127, etc. Cf. also Corwin, *cited*, p. 45.

may declare general foreign policies does not, he writes, "confer a power to direct the details of their execution any more than the power to declare war confers a power to direct the details of military campaigns."[20] A review of precedents supports this statement.

LEGISLATIVE CONTROL OF APPROPRIATIONS

(c) Acting on the theory that, since Congress has the authority to provide for raising, equipping and maintaining the military forces of the country, the ultimate control of the military machine is in the legislative rather than the executive branch of the government,[21] Congress has at times sought to control the use of the armed forces when abroad.

In 1912, Senator Bacon wished the Senate to control the use of American forces in foreign countries with which we were not at war by the indirect method of stopping their pay under the regular appropriations. He proposed as an amendment to the regular army appropriations bill that "except as herein provided, or specifically otherwise provided by statute," the moneys appropriated in the army appropriations bill should not be used for the "pay or supplies of any part of the army of the United States employed or stationed or on duty in any country or territory beyond the jurisdiction of the laws of the United States or in going to or returning from points within the same." He further proposed "that this prohibition shall not apply to cases of emergency within the discretion of the President, arising at a time when the Congress of the United States is not in session," but that "no part of the money herein appropriated shall be used for the pay and supplies of said part of the army remaining in said foreign country beyond the term of ten days after the beginning of the next ensuing session of Congress, unless expressly authorized thereto by act of Congress."

Senator Bacon argued that United States troops were being used freely in China and Central America, and he thought Congress should control such use through its power of appropriation. Senator Root maintained that Congress should not encroach upon the President's powers as Commander-in-Chief, and the amendment was defeated without a recorded vote.[22]

NICARAGUAN DISCUSSION REVIEWS ISSUE

The recent attempt in the Senate to remove the American marines from Nicaragua was likewise based on the congressional power of appropriation. On April 18, 1928, Mr. Blaine, Senator from Wisconsin, proposed the following amendment to the annual naval appropriation bill:

> *Provided*, That after December 25, 1928, none of the appropriations made in this act shall be used to pay any expenses incurred in connection with acts of hostility against a friendly foreign nation, or any belligerent intervention in the affairs of a foreign nation, or any intervention in the domestic affairs of any foreign nation, unless war has been declared by Congress or unless a state of war actually exists under recognized principles of international law.
>
> The words "acts of hostility" and the words "belligerent intervention" shall include within their meaning the employment of coercion or force in the collection of any pecuniary claim, or any claim of right to any grant or concession for or on behalf of any private citizen, copartnership, or corporation of the United States, against the government of a foreign nation, either upon the initiation of the Government of the United States or upon the invitation of any foreign government existing *de jure* or *de facto*.[23]

In explaining the purpose of his amendment, Senator Blaine said in part:

> "It is claimed that if we were to withdraw now, there would be an unsatisfactory condition in Nicaragua among the contending factions, when the election is held. I have contended that we blundered into Nicaragua and I have no doubt that we will have to blunder out, and I am trying to point a way by which this administration can save its face and prevent any further blunders. I think a period of 60 days after the election is held ought to give ample time in which to get out. . . ."

To these statements Senator Shipstead replied:

> "The idea that the Senator has proposed in his amendment is contrary to our history in the Caribbean, in Latin America, for the past thirty years. The Senator proposes that we attend to our own business, and I say that it is a very unstatesmanlike proposition."

20. Wright, *cited*, p. 283.

21. Cf. Burdick, C. K., *The Law of the American Constitution*, p. 261.

22. U. S. *Congressional Record*, 62nd Cong., 2nd sess., p. 10,921-10,930.

23. U. S. *Congressional Record*, 70th Cong., 1st sess., April 18, 1928, p. 6962.

NICARAGUA ELECTION NOT SPECIFIED IN APPROPRIATION

In favor of his amendment Senator Blaine argued that although the President is Commander-in-Chief of the Army and Navy, his powers in that capacity are merely paper powers, unless Congress appropriates the funds to create and maintain an Army and Navy. By appropriating funds for a specific purpose the Congress can make their use for other purposes illegal. He continued:

> ". . . . When Congress appropriates money to build barracks for the marines at Quantico, Va., the President cannot take that money and build barracks for the marines at Corinto, in Nicaragua. . . . The President as Commander-in-Chief has no more right to divert public funds dedicated for specific purposes by acts of Congress in relation to the Army and the Navy than he has to divert public funds devoted to any other purpose. To divert that money contrary to the act of Congress is an offense against the law, whether he does it as President or as Commander-in-Chief of the Army and Navy."[24]

He remarked further that no money had been appropriated for supervising an election in Nicaragua and the "appropriations which have been made are for specific purposes and those purposes are defined."

In response to the arguments of Senator Blaine, Senator Norris asked "just how the expense of carrying on elections or supervising elections in foreign countries is met and how the money is obtained to carry on those elections. The Senator has said there is no appropriation in the pending bill for that purpose."

The following colloquy then ensued:

> MR. HALE: There is no wording of that nature or anything referring to it.
>
> MR. NORRIS: If the bill becomes law, will the President be compelled to cease carrying on and paying the expenses of elections in foreign countries, or can he go on as he has in the past?
>
> MR. HALE: The increases which have been made are on certain items. For instance, the item for provisions has been increased $242,543 above last year. The item for clothing has been increased, as have also the items for military stores, transportation and recruiting, and repairs of barracks.
>
> MR. NORRIS: Let me ask the Senator a further question. If the bill has no provision in it for the carrying on or supervising of elections in foreign countries, I suppose the Senator would have no objection to an amendment which would make that specific and provide that none of the money here appropriated should be used for the carrying on of elections or paying the expenses of the marines for carring on or supervising elections in foreign countries?
>
> MR. HALE: I do not think that would be advisable at all. . . .
>
> * * * *
>
> MR. DILL: The fact is that the money which is paid for the supervising of these elections is in the appropriation for the marines. That is the fact, is it not?
>
> MR. HALE: It is to take care of the subsistence of the marines in China or Nicaragua or anywhere else they may be.
>
> MR. DILL: That is where they expect to get the money which will be used for the marines in the supervision of these elections?
>
> MR. HALE: For their subsistence.
>
> MR. DILL: Why not answer the question?
>
> MR. WARREN: Oh, Mr. President, we understand all this.
>
> MR. DILL: I want to get it clear.
>
> MR. WARREN: This is an annual appropriation bill. The President has certain rights because he is Commander-in-Chief of the Army and Navy. I suggest that the Senator go to him if he wants to know these details.
>
> MR. DILL: Oh, no; I am going to the right place now. I am inquiring of those in charge of the bill, who should know.
>
> MR. WARREN: This is the annual supply bill for food, clothing and incidental expenses for the Navy and Marine Corps.
>
> MR. DILL: And this is the place to stop the money from being spent, and not by going to the President.
>
> MR. WARREN: This is the place to fill the RECORD, so the Senator may go ahead.[25]

Discussion of the Blaine amendment occupied the time of the Senate for several days. Among those who opposed it was Senator Borah who argued that if Congress refused to create an army or navy, naturally the President's powers as Commander-in-Chief would be only paper powers; but, said Senator Borah, when once an army or a navy is in existence, the right to command belongs to the President, and the Congress cannot take that power away from him," because it "is given to him by the Constitution."[26]

Discussion between Senator Borah and Senator Blaine continued as follows:

> MR. BLAINE: Does the Senator contend that when the Army is created, or when the Navy is created, Congress then must appropriate money without limit and without restrictions to meet

24. *Ibid.*, p. 6965-6.

25. *Ibid.*, p. 6622.

26. *Ibid.*, April 20, 1928, p. 7204.

the demands of the President as Commander-in-Chief; or must the President exercise his power within the limits fixed by Congress, the only power having the constitutional right to make an appropriation?

MR. BORAH: Congress is the only power that can appropriate money. The President cannot appropriate money, neither can Congress command the Army and the Navy. . . .

MR. BLAINE: Mr. President, just one other question of the distinguished Senator from Idaho. I know that ordinarily he does not hedge. . .

I repeat; assuming that Congress has created an army and has created a navy, after that is all done, then may Congress not limit the uses to which money may be put by the President as Commander-in-Chief in the operation and in the command of the Army and Navy?

The Senator has said that, of course, if we do not create an army and navy, then there is nothing over which the President has command. But we have an Army and a Navy. Cannot Congress limit, by legislation, under its appropriation acts, the purposes for which money may be used by the President as Commander-in-Chief of the Army and Navy?

MR. BORAH: I do not know what the Senator means by "purposes for which it may be used." Undoubtedly the Congress may refuse to appropriate and undoubtedly the Congress may say that an appropriation is for a specific purpose. In that respect the President would undoubtedly be bound by it. But the Congress could not, through the power of appropriation, in my judgment, infringe upon the right of the President to command whatever army he might find. Congress might, by refusing to make an appropriation or by limiting it to a specific purpose, make it physically impossible for the President to discharge his duty in a particular instance. . . . But if the Army is in existence, if the Navy is in existence, if it is subject to command, he may send it where he will in the discharge of his duty to protect the life and property of American citizens. Undoubtedly he could send it, although the money were not in the Treasury.[27]

SENATOR BORAH UPHOLDS THE PRESIDENT

However, aside from the constitutional question of whether the Congress through its power to appropriate had the right to control the powers of the President as Commander-in-Chief; even aside from the question of whether the President had violated the Constitution and exceeded his powers in intervening in Nicaragua and in making the agreement to supervise an election, Mr. Borah felt that the honor of the United States was involved and the President should be supported, despite the Constitution.[28]

It is true that Mr. Borah said:

> "I am of the opinion that the facts which were given the President and Secretary of State for the purpose of justifying intercession were not based upon realities. I do not believe that the true facts justified sending the marines; but, of course, the President acted upon the facts as presented to him."[29]

And a few minutes later Mr. Borah elaborated his position:

> "The President may employ the troops in a foreign country for the purpose of protecting life and property, as a defensive act. . . . But the moment that action takes on the nature of an aggressive action, the seizing of territory, the carrying on of armed conflict, a controversy with any faction or any part of the Government; when it becomes war, as war is defined by the Supreme Court of the United States, a conflict between two opposing forces, I think the President, when Congress is available, should also consult the Congress, and have his authority confirmed by Congress."[30]

Nevertheless, he argued, whether or not the President violated the Constitution in sending marines to Nicaragua, our forces are there now, and "after having been there for a time, we entered into an agreement, and that agreement has been fulfilled upon the part of those with whom we made the agreement"; they have laid down their arms and now "rely entirely upon the United States for their future rights, political and military." Therefore, continued Mr. Borah, "we are estopped at this time, as a Government and as a people, from saying that we did not have the authority, because others have acted on our assurance to their disadvantage. . . ."[31]

In other words, the question of whether or not the Constitution had been violated was of less importance than the question of keeping international agreements in which the President had—legally or not—involved the country. Senator Swanson took the same position. He denied the right of the President to make the agreement with Nicaragua,

27. *Ibid.*, p. 7204-5.

28. Mr. Borah said of the election agreement that "we must carry it out whether the technical power to make it existed or not," and that "it would be an act of dishonor to plead want of power in such circumstances." *Ibid.*, p. 7196-7. Cf. also p. 7203.

29. *Ibid.*, p. 7189.

30. *Ibid.*, p. 7199.

31. *Ibid.*, p. 7194.

but, regardless of whether the United States had "a constitutional right or a legal right or a technical right to make that agreement or act," he felt "it would be bad faith to refuse to carry out the agreement now."[32]

Senator Norris asked how the Senate could ever get the President to consult Congress in such matters as long as it continued to vote approval of Presidential actions which it considered wrong. Senator Shipstead referred to the danger of letting those in charge of foreign offices pledge their governments to agreements which might lead to war.[33]

AMENDMENT DEFEATED BUT QUESTION UNANSWERED

The proposed Blaine amendment in modified form was defeated by a vote of fifty-two to twenty-two on April 25, 1928. By some this vote may be interpreted as an admission by the Senate that the Congressional power to make appropriations may not be used to control the President in his use of the armed forces abroad. A closer study of the Senate debate, however, may show that, in spite of the discussion, that question was not voted upon. Similarly, the question of whether the President violated the Constitution (1) in landing troops in Nicaragua, (2) in making the election agreement or (3) in undertaking a *de facto* war against Sandino, appears not to have been voted upon. The vote may be explained as a wish to uphold the international engagement made by the President, regardless of whether or not he had the constitutional authority to make it.

Thus, the constitutional question of whether Congress, through its appropriating power, can control the President in his use of the armed forces abroad remains where it was. If Congress should refuse to create an army or navy, it would certainly limit the President's powers as Commander-in-Chief. Once created, however, the President has a constitutional right to command them. In practice this has been interpreted as a right to use them when and where he will as long as he stops short of war.

32. *Ibid.*, p. 7198.
33. *Ibid.*, p. 7199, 7205.

CONGRESS CONTROLS APPROPRIATIONS NOT FORCES

Congress undoubtedly has power to limit the amount of an appropriation and thus indirectly to tie the hands of the President, but such a limitation on the part of Congress would appear to offer a very crude form of control and might seriously hamper the President in the exercise of his constitutional obligations as Commander-in-Chief.

Instead of attempting, therefore, to control through the *amount* appropriated, Congress might seek, as in the recent Senate debate, to limit the *purposes* for which the armed forces might be used, *i. e.*, it might provide that none of the money appropriated for clothing, maintenance, transportation, and so on of the Army or Navy should be used while the armed forces were supervising an election in Nicaragua.

It is admitted that Congress may legitimately refuse altogether to create an army or navy; or, once having created them, it may refuse to provide for their further maintenance; or it may itemize the appropriations as it sees fit, *i. e.*, for clothing, housing, transportation. All of these are purposes for which the money appropriated might be used. But limitations as to the purposes for which the money appropriated may be used are something quite different from limitations as to the purposes for which the Army or Navy may be used. In view of the fact that when once the Army or Navy is created the President is Commander-in-Chief, it is highly doubtful whether the appropriation power of Congress legitimately extends so far as to limit the uses to which the Army or Navy may be put. Such a limitation would seem to invade the powers of the President as Commander-in-Chief.

If, nevertheless, Congress placed such a blanket limitation on all appropriations for all armed forces (the proposed Blaine amendment covered only naval forces), and the President refused to comply on the ground of having a constitutional duty to protect the life and property of American citizens abroad, the only remedies against him would be either the constitutional one of impeachment, or the extra-constitutional one of the pressure of public opinion.

PROTECTION OF CITIZENS ABROAD UNDER INTERNATIONAL LAW

3. *Observations on the Limits Imposed by International Law.* So far as the United States Constitution is concerned, according to Willoughby, the President, "in the exercise simply of his authority as Commander-in-Chief of the army and navy, may, unless prohibited by congressional statute, commit or authorize acts not warranted by commonly received principles of international law."[34]

Having regard, however, to international law rather than to United States constitutional law, are there limits to the right of a state to use its armed forces abroad in the absence of a declaration of war?

It is fair to assume that the Chief Executive of the United States, even when permitted by Congress, will not generally wish to authorize acts contrary to international law. It is impossible to discuss here in full the limits imposed by international law upon state action in the protection of nationals abroad. It is possible, however, to present some of the questions raised by the intervention of the United States in Nicaragua.

The right to protect the life and property of its nationals abroad is almost universally claimed by states as a right granted by international law. The extent of this right is, however, indefinite. John Bassett Moore makes a distinction between political intervention and non-political intervention, the latter being merely protection or "interposition upon behalf of citizens." Mr. J. Reuben Clark, in his *Memorandum on the Right to Protect Citizens in Foreign Countries by Landing Forces*, has the following to say of this distinction:

> "Non-political intervention or interposition need not have, and as a matter of fact almost never has, so far as our precedents go, any reference to the internal politics of the invaded country in the matter of either supporting or changing the particular form of government. . . .
>
> "The sole motive for this non-political intervention or interposition is the protection of citizens or subjects either from the acts of the government itself or from the acts of persons or bodies of persons resident within the jurisdiction of a government which finds itself unable to afford the requisite protection, until the government concerned is willing or able itself to afford the protection. . . .
>
> "In other words, the distinction must be drawn between an intervention designed to secure a change, or to protect from change a particular form of government, or a dynasty, and an intervention having no political purpose whatsoever, being designed merely to protect citizens where the local government is either unable or unwilling to give such protection, the internal policies of the affected government being of no concern whatsoever to the interposing power save as they affect the protection and security of its citizens and their property."[35]

Even if Mr. Clark is correct in his statement that non-political intervention "almost never has, so far as our precedents go, any reference to the internal politics of the invaded country in the matter of either supporting or changing the particular form of government," it is open to question whether the distinction between political and non-political intervention can long be maintained in actual fact.

Indeed, Mr. Clark admits that at times non-political intervention by the United States to protect its interests has resulted in "a real interference in the political affairs of a foreign country either with or without the request of a foreign government," although "at other times the interference in political affairs has been merely incidental—indeed, accidental—and not the main purpose of the action taken."[36]

ORIGINAL PURPOSE OF TROOPS IN NICARAGUA

The recent debate in the Senate on the appropriations for marines in Nicaragua had some bearing on this question. Senator Caraway asked to be informed concerning the original purpose in sending troops to Nicaragua, and the following discussion took place:

> MR. BORAH: As stated by the President, to protect the life and property of American citizens.
>
> MR. CARAWAY: When was it that we decided, then, that we would hold an election? . . . . When did we change the object of having the marines there?
>
> MR. BORAH: I am going to cover that point. The contention of the Government is that they

34. Willoughby, W. W., *Cited*, Vol. 2, p. 1212.

35. Clark, *Memorandum, cited*, p. 23 ff.

36. *Ibid.*, p. 30.

have never changed their object. The contention of the Government is that the holding of an election is one of the steps by which they restore order and thereby insure safety and security to American life and property.

MR. CARAWAY: . . . . Suppose some people refuse to accept that election, do we propose to make them do so with bayonets?

MR. BORAH: . . . . I would not be in favor of such a course.[37]

And a few minutes later:

MR. BORAH: . . . . I am committed to the proposition of a fair election, hoping, but not knowing, of course, that it will tend to stability and that we may come out.

MR. WHEELER: Mr. President, will we not be considered morally bound to send marines down there and to keep them [the new officials] in power after they are elected?

MR. BORAH: Mr. President, let me say this to the Senator. To judge the future by the past, if, after they are elected, their government falls, if Chamorro and Diaz overthrow it again and our people are placed in danger and property is threatened, we will undoubtedly go back.[38]

* * * *

MR. CARAWAY: I want to ask the Senator another question. What part of the election is chasing the alleged bandit down there? Has that anything to do with the election? . . . .

MR. BORAH: Yes; that is a part of holding the election—that is maintaining order, without which there can be no fair election.[39]

The argument just examined presents the thesis that the President may engage in a *de facto* war (as, for example, against Sandino) in order to guarantee a fair election in order to protect the life and property of American citizens.[40]

LIMITS OF INTERVENTION

The question then arises whether such measures are to be regarded as non-political measures of protection, or as political intervention? While it has, until recently, generally been the avowed policy of the United States not to engage in political intervention[41]—at least in Europe—international law probably does not forbid political intervention in certain circumstances. The law on the subject is uncertain. But how far may a state legally go in intervening in another state? Measures of intervention are frequently acts of war, but it should be borne in mind that the existence of a state of war *de jure* does not depend upon the character of the coercive measures undertaken by the states in dispute. From a legal point of view "the existence of a state of war between two States depends upon their intention and not upon the nature of their acts. Accordingly, measures of coercion, however drastic, which are not intended to create, and are not regarded by the State to which they are applied as creating a state of war, do not legally establish a relation of war between the States concerned."[42]

Is there, then, no limit to the measures of intervention which one state may employ against another except the attitude of the smaller state? So long as the weaker state —either of its own free will, or through necessity, or because its government is in the hands of unscrupulous men who barter away its independence—agrees to permit intervention in its affairs or, at least, refrains from considering the intervention as creating a state of war, is there no control over the measures taken by the intervening state against the weaker state except the limits which it chooses to set for itself?

Measures of intervention are frequently justified as police measures, but a distinction must be kept in mind between international police measures (such as are sometimes spoken of in connection with the League of Nations) and measures taken by a single state on its own responsibility.

CONCLUSIONS

In retrospect certain facts become clear. The power of the President to employ the armed forces of the United States abroad, in the absence of a declaration of war, is not unlimited, but the limits are not easily determinable. Of the possible constitutional

37. U. S. *Congressional Record*, 70th Cong., 1st sess., p. 7190.

38. *Ibid.*, p. 7194.

39. *Ibid.*, p. 7190.

40. Elsewhere the idea has been advanced that since the use of American forces abroad for protective purposes does not constitute war, Congress has no authority to control such use. See Clark, *Memorandum, cited*, p. 36.

41. Cf. Hyde, C. C., *International Law*. Vol. I, p. 124 ff; Moore, J.B., *International Law Digest*, Vol. VI, Sections 897 ff.

42. League of Nations, *Legal Position Arising from the Enforcement in Time of Peace of the Measures of Economic Pressure Indicated in Article 16*, p. 87. (A. 14. 1927. V.) Cf. Wright, *cited*, p. 284: "Battles may be fought, vessels captured and commerce embargoed without war, and on the other hand war may exist without a gun fired or a vessel captured or a trade route disturbed. The Supreme Court has distinguished the recognition of 'war in the material sense' from 'war in the legal sense.'" Cf. also Wright, Q., *Changes in the Conception of War*. (American Journal of International Law, Vol. 18, p. 755-67.)

forms of control it is seen that judicial control eliminates itself by the refusal of the courts to pass upon the constitutionality of "political" acts of the President.

As for congressional control, an ultimate limit to the President's powers as Commander-in-Chief remains with Congress because of its constitutional power to declare war. The practical effectiveness of this form of control has been gradually weakened through executive precedent and practice, when on several occasions the Executive has so acted as to make war inevitable. Nevertheless, a strong Congress, by virtue of this power and because of its ability also, through joint resolutions, to crystallize public opinion against presidential interventions, may act as an ultimate limit on the President's power.

The other forms of congressional control, *i. e.*, reduction of the amount of appropriations, or limitations as to the purposes for which the appropriations may be used, would probably not be very effective or immediate.

Taken in connection with the ultimately controlling powers of Congress to declare war, to refuse to appropriate for any armed forces, or to impeach the President, the force of public opinion presents possibly the most effective check.

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